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Regulatory
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Proposed Regulation Agency Background Document

Agency name	Department of Health (Board of Health)
Virginia Administrative Code (VAC) citation	12 VAC 5 -650
Regulation title	Schedule of Civil Penalties
Action title	New regulation establishing a uniform schedule of civil penalties for violations of onsite sewage and alternative discharging sewage treatment system regulations.
Date this document prepared	September 24, 2008

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

This proposed regulation establishes a uniform schedule of civil penalties for violations of the Board of Health's ("Board") regulations pertaining to conventional and alternative onsite sewage systems (12VAC5-610 or successor), and for violations of the Board of Health's regulations pertaining to alternative discharging sewage treatment systems for individual single family homes (12VAC5-640 or successor).

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

1) Va. Code § 32.1-164.1 (2007 Acts of Assembly, Chapter 514); 2) Board of Health/Department of Health (“Department”); 3) mandatory.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.

1) The proposed regulation, while fulfilling specific statutory requirements, will allow the Department of Health to employ civil penalties to enhance existing regulatory programs for supervising and controlling the safe and sanitary treatment and disposal of sewage. 2) Currently, the Department may ask for criminal penalties (Class I Misdemeanor), may initiate civil proceedings, and may collect civil charges only with the consent of the affected party. Under the proposed regulation, the Department may charge civil penalties in amounts that are relatively small in comparison to existing penalties. The goal of the regulation is to enhance the Department’s ability to protect public health and the environment by providing an enforcement tool that may be scaled to match the seriousness of a violation.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the “Detail of changes” section.)

The proposed regulation will specify uniform penalties for violations of the Board’s regulations. The penalty for any one violation may not exceed \$100 for the initial violation, \$150 for each additional violation. Each day during which a violation is found to exist will constitute a separate offense, however violations arising from the same set of operative facts may not be charged more than once in any 10-day period. A series of violations arising from the same set of operative facts may not result in civil penalties exceeding a total of \$3,000. The Department may not charge civil penalties in cases where an unoccupied structure does not contribute to pollution of public or private water supplies or to the contraction or spread of disease. The Department may pursue other remedies as provided by law, however civil penalties must be in lieu of criminal penalties except where a violation contributes to or is likely to contribute to the pollution of public or private water supplies or the contraction or spread of disease. The Department may issue a civil summons ticket as provided by law for a scheduled violation.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

1) The primary advantage to the public comes from improving the Department's ability to protect citizens and the environment from the harmful effects of sewage. As the number of alternative onsite sewage systems in the Commonwealth continues to increase, citizens, local governments, regulators, and onsite sewage professionals agree that ongoing operation, maintenance, and monitoring of these systems is essential to assure that they function properly. When these systems are not properly maintained and operated, they may discharge untreated or partially treated sewage directly into the Commonwealth's ground and surface waters. The Board's regulations and policies increasingly require owners of alternative onsite sewage systems to perform certain activities, such as monitoring inspections and maintenance, to assure that systems are operating properly. The ability to assess civil penalties, as an alternative to criminal enforcement, is a more effective enforcement strategy to employ in such a "performance-based" regulatory program. A disadvantage, expressed by some in the regulated communities, is that Department staff may misuse or abuse the new penalties.

2) Civil penalties will improve the Department's ability to enforce the Board's regulations by providing another enforcement tool. Existing statutes provide for enforcement actions via the Administrative Process Act (APA) such as informal fact-finding conferences to make case decisions, e.g., permit suspension, revocation, the issuance of orders by the Board, civil actions in circuit courts, and criminal actions. These are relatively "heavy" actions that are appropriate in some cases. Currently, civil charges can only be collected with the consent of the affected party and are employed in conjunction with a consent order. Properly used, civil penalties can be viable alternatives when existing enforcement tools are too heavy-handed for many routine enforcement actions. Civil penalties are not intended to be punitive, but are intended to encourage compliance with environmental health regulations before a situation deteriorates to the point that heavier enforcement is warranted. A disadvantage to the agency will be the perceived drains on agency staff and resources required to implement the new civil penalties.

3) Civil penalties are particularly critical for managing the onsite sewage and alternative discharging sewage system programs. Several local governments have enacted ordinances requiring operation and maintenance of alternative onsite sewage systems. The Department is currently developing new regulations for the Board that will require routine monitoring, maintenance, and reporting for alternative onsite systems. These are already required in the alternative discharging system program. Typically, an owner is responsible for maintaining a contract with a private-sector provider to perform routine inspections, tests, and maintenance. The owner (or the provider) must forward inspection reports and test results to the Department. Criminal or other "heavy" enforcement actions are not appropriate for situations, such as the failure to submit a report or keep a maintenance contract in effect. Civil penalties will provide options for the Department to scale its enforcement actions to the seriousness of a particular situation. The Department will develop administrative guidelines for implementing the civil penalties. These guidelines will seek to assure the penalties are not abused or misused by staff.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There are no disproportionate impacts on localities.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to Allen Knapp, 109 Governor Street, Office of Environmental Health Services, Fifth Floor, Richmond, Virginia, 23219, (804) 864-7476, allen.knapp@vdh.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last date of the public comment period.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures	None. The agency will be able to absorb the minimal costs associated with administering the Environmental Health Education and Training fund and collecting civil penalties.
Projected cost of the regulation on localities	None.
Description of the individuals, businesses or other entities likely to be affected by the regulation	The individuals likely to be impacted include owners of onsite and alternative discharging sewage systems (homeowners and businesses), onsite sewage system installers, and individuals and businesses that provide maintenance services such as pumpouts, and repair or replacement of systems or system components.
Agency's best estimate of the number of such	The agency estimates that between 175 and 350

<p>entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>entities may be affected each year because of a sewage system malfunction that is not remedied within 30 days. As discussed below, the agency estimates that approximately 66 entities may incur a civil penalty. The majority of these are expected to be individual homeowners with sewage systems that are out of compliance, due to either outright failure or some other cause. A small percentage of the affected entities may be small businesses.</p>
<p>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</p>	<p>Use 250 as a reasonable estimate of affected entities (i.e. potential violators). Of the 250 entities potentially penalized for failure to remediate system failures, approximately 1/3 (66) would be severe enough to incur civil penalties. It is estimated that approximately 75% of those 66 owners would have the minimal penalty of \$100; 20% the additional penalty of \$150; and 5% have the maximum fine of \$3,000 imposed. This results in total costs of \$15,950.00.</p>

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

The agency currently seeks compliance with regulations through education, notices, and other activities that are typically viewed as precursors to enforcement actions. The Department may bring criminal actions and civil actions in court (with assistance from the Office of the Attorney General) to enforce the Board’s regulations. The proposed civil penalties are intended to fit between the current enforcement options. As such, they are intended to be less burdensome or intrusive than existing criminal and civil enforcement options.

Regulatory flexibility analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

Because of the statutory requirement to establish a uniform schedule of civil penalties, the agency has not considered other methods.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

Commenter	Comment	Agency response
Dr. Samuel Peters	I am all for penalties for sewage violations so long as they are not financial.	The agency is required by law to establish a schedule of civil penalties.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The new regulation will have little direct impact on families in the Commonwealth. The action, by offering an alternative to existing criminal and civil enforcement, may encourage economic self-sufficiency and the assumption of responsibility on the part of regulated persons. The action is intended to improve the Department's enforcement capabilities, particularly in the area of the operation and maintenance of alternative onsite sewage systems. As such, the agency expects that its efforts to protect public health and the environment (ground and surface water quality) will be improved and that families will benefit from a safer environment. The regulation will have a direct, short-term financial effect on a family that is in violation if a civil penalty is charged. Any civil penalties collected will be credited to the newly created Environmental Health Education and Training Fund. This fund is to be used to support training for private- and public-sector individuals in all areas of Environmental Health and may be used for research to improve public health and for protection of the environment. Family members may benefit directly from the improved availability of educational and training opportunities and indirectly from improved environmental and public health protection.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

Current section	Proposed new section	Current requirement	Proposed change and rationale
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number	number, if applicable		
NA	20	NA	Proposed change- definitions.
NA	30	NA	Proposed change- The purpose of the proposed regulation is to support enforcement activities necessary to discharge the Board's responsibilities.
NA	40	NA	<p>Proposed change- The proposed regulation applies only in localities where the local government has entered into a contract with the Department for operation of the local health department.</p> <p>Rationale- § 32.1-164.I of the Code authorizes the Department, not local governments, to charge civil penalties. Local governments have separate authority for civil penalties (§ 15.2-2157).</p> <p>Proposed change- The proposed regulation applies to activities under two of the Board's regulations- the Sewage Handling and Disposal Regulations (12VAC5-610 or successor) and the Alternative Discharging Sewage Treatment Regulations for Individual Single Family Dwellings (12VAC5-640 or successor). The proposed regulation does not limit the Board's or the Commissioner's authority, except as specifically provided in the Code.</p> <p>Rationale- § 32.1-164.I of the Code requires the Board to establish a schedule of civil penalties for violations of regulations promulgated pursuant to § 32.1-164.B of the Code. The two regulations mentioned above are the only regulations the Board has promulgated pursuant to § 32.1-164.B of the Code.</p>
NA	50	NA	<p>Proposed change- The proposed regulation designates the Department as the primary agent for Commissioner; it states that the Commissioner may delegate powers under this chapter. The regulation provides specific delegation to local and district health directors who are employees of the Department; they may delegate to subordinates as they deem necessary.</p> <p>Rationale- This sections provides clear lines of delegation for implementing the regulation.</p>
NA	60	NA	Proposed change- The proposed regulation declares the following conduct unlawful and subject to civil penalties:

			<p>A. Violation of any provision of the Sewage Handling and Disposal Regulations or successor regulation, including failure to comply with the provisions, requirements, conditions, or standards contained in a construction permit or in an operating permit.</p> <p>B. Violation of any provision of the Alternative Discharging Sewage Treatment Regulations for Individual Single Family Dwellings or successor regulation, including failure to comply with the provisions, requirements, conditions, or standards contained in a construction permit or in an operating permit.</p> <p>C. Failure to comply with any order issued by the Board or Commissioner.</p> <p>Rationale- This section establishes the types of conduct that will be subject to civil penalties.</p>
NA	70	NA	<p>Proposed change- The proposed regulation establishes the following uniform schedule of civil penalties:</p> <p>A. To install or cause to install, modify or cause to modify, use or operate an onsite or alternative discharging sewage system without a permit issued by the Commissioner- \$100.00 for the first violation, \$150.00 for each additional violation.</p> <p>B. To discharge treated or untreated sewage on the surface of the ground or into the waters of the Commonwealth without a permit- \$100.00 for the initial violation, \$150 for each additional violation.</p> <p>C. To fail to obtain or keep a contract for operation, maintenance, or monitoring of an onsite or alternative discharging system to the extent that such contract is a requirement of the Board's regulations - \$50.00 for the initial violation, \$100.00 for each additional violation.</p> <p>D. To fail to submit to the Department a laboratory test result, or an inspection or other report to the extent that such report is a requirement of the Board's regulations- \$50.00 for the initial violation, \$100.00 for each additional</p>

			<p>violation.</p> <p>E. To engage in unlawful transportation or handling of sewage or septage, the extent such activities are not regulated by another agency of the Commonwealth - \$100.00 for the initial violation, \$150.00 for each additional violation.</p> <p>F. To commit any unlawful act described in Section 50 of the proposed regulation which is not specifically described in the proposed regulation- \$25.00 for the initial violation, \$50 for each additional violation.</p> <p>Rationale- the proposed schedule of civil penalties reflects the relative degree of seriousness of the violations.</p> <p>Proposed change- The Department may not charge civil penalties for activities related to land development. The Department may not charge civil penalties for an unoccupied structure unless such structure contributes to the pollution of public or private water supplies or the contraction or spread of infectious, contagious, or dangerous diseases. When a series of violations arises from the same operative set of facts, the civil penalties may not exceed a total of \$3,000.</p> <p>Rationale- these requirements are specifically stated in the Code.</p>
NA	80	NA	<p>Proposed change- The designation of a particular violation for a civil penalty must be in lieu of criminal penalties, except for any violation that contributes to or is likely to contribute to the pollution of public or private water supplies or the contraction or spread of infectious, contagious, or dangerous diseases.</p> <p>Rationale- This requirement is specifically stated in the Code.</p>
NA	90	NA	<p>Proposed change- The Department must prepare a civil summons ticket for use in implementing the proposed civil penalties.</p> <p>Rationale- This section requires the Department to prepare a civil summons ticket to be used by staff and lists the minimum requirements for such tickets.</p>
NA	100	NA	<p>Proposed change- Any employee of the Department who has been delegated authority by the State Health Commissioner</p>

			<p>may issue a civil summons ticket. Tickets may be delivered in person after presentation of proper credentials or in any other manner provided by law.</p> <p>Rationale- This establishes procedures and authority for issuing civil summons tickets.</p> <p>Proposed change- The Department must credit all civil penalties collected to the Environmental Health Education and Training Fund established pursuant to § 32.1-248.3 of the Code.</p> <p>Rationale- This requirement is specifically stated in the Code.</p>
NA	110	NA	<p>Proposed change- Before the Department may issue a civil summons ticket it must notify the alleged violator, at least thirty days must pass from the date the alleged violator received notice of the violation, and the violation must remain uncorrected. Violations arising from the same operative set of facts may not be charged more than once in any 10-day period nor may the Department charge more than one civil penalty from the same set of operative facts.</p> <p>Rationale- These are additional requirements that are specifically provided in the Code.</p>